

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CATHERINE LOW, a single woman,

Plaintiff,

v.

PATRICK R. DONAHOE, Postmaster  
General of the United States,

Defendant.

NO: 2:14-CV-0226-TOR

ORDER GRANTING MOTION TO  
DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 11).

Dustin Deissner represents Plaintiff. Vanessa R. Waldref represents Defendant.

This matter was submitted for consideration without oral argument. The Court has reviewed the completed briefing and the record and files herein, and is fully informed.

FACTS

On January 3, 2011, Plaintiff suffered injuries when she slipped on ice outside a United States Post Office building. ECF No. 1 at ¶ II(A). On February 1,

1 2011, Plaintiff's counsel sent a letter to the Postal Service indicating that Plaintiff  
2 had slipped on the ice and requesting the Postal Service to have its insurance  
3 carriers contact Plaintiff's counsel. ECF No. 11-1 Ex. A (Arstad declaration).  
4 Steven Arstad, a Postal Service tort claim coordinator, responded on February 7,  
5 2011, and notified Plaintiff's counsel that proper consideration of the claim  
6 required a completed Standard Form (SF) 95 claim form, which Arstad enclosed  
7 therein. ECF No. 11-1 Ex B. The letter also directed counsel's attention "to the  
8 instructions on the reverse side of the claim form" and instructed counsel to  
9 "[c]omplete all sections of the claim form." *Id.* The letter further indicated that  
10 "[v]alid claims must be received within two years of the accident date to be  
11 considered." *Id.*

12 Plaintiff's counsel replied by letter on March 11, 2011, and enclosed a SF 95  
13 claim form. ECF Nos. 1-1 at 1; 11-1 Ex. D; 14 at ¶ 2. The claim form was signed  
14 by Plaintiff, but undated. ECF No. 1-1 at 1. Box 12b of the form, in which  
15 Plaintiff was to indicate the amount of the claim for personal injury, stated:  
16 "unknown." ECF Nos. 1-1 at 1; 14 at ¶ 3. Box 12d, in which Plaintiff was to  
17 indicate the total amount for her claim, was left blank. ECF No. 1-1 at 1. On  
18 March 14, 2011, Arstad replied:

19 This is in regard to the claim filed pursuant to the Federal Tort Claims  
20 Act.

1 The Claim submitted is incomplete as a sum certain (exact dollar  
2 amount) has not been specified (see attached copy). This claim is  
therefore invalid. Please refer to the instructions on the reverse of the  
form.

3  
4 If your client is still treating for injury please wait until treatment has  
concluded to file this claim. At that time, please complete a new form  
5 SF 95 "Claim for Damage, Injury or Death" being certain to complete  
all boxes and indicating amounts on line 12 including a "Sum  
Certain" in box 12d and return to this office for processing.

6  
7 In the event you have any questions or need assistance in completing  
the form, please telephone me at the number listed below.

8 ECF Nos. 11-1 Ex. E; 13-2; 14 at ¶ 4.

9 Plaintiff did not file a completed SF 95 claim form until August 16, 2013.<sup>1</sup>

10 ECF No. 14 at ¶ 6. The Postal Service denied the claim on May 22, 2014. *Id.* at ¶

11 7. Plaintiff filed a complaint in this Court on July 15, 2014, seeking damages  
12 under the Federal Tort Claims Act (FTCA). ECF No. 1.

13 //

14  
15 <sup>1</sup> Plaintiff attempted to file the claim on August 16, 2013. ECF No. 13-3. This  
16 claim appears to have been returned undelivered and thereafter Plaintiff sent the  
17 claim a second time on August 26, 2013, which was received by Arstad on August  
18 29, 2013. ECF No. 11-1 Ex. F. For purposes of this motion, the Court assumes  
19 *arguendo* that the claim was filed on August 16, 2013, as asserted in Plaintiff's  
20 statement of undisputed fact. ECF No. 14 at ¶ 6.

## DISCUSSION

Defendant seeks dismissal under Federal Rule of Civil Procedure 12(b)(6), alleging that Plaintiff's claim is precluded by the FTCA's two-year statute of limitations. ECF No. 11. Plaintiff contends, first, that her claim was filed on March 11, 2011, and that the subsequent filing merely represented an amendment to that claim. ECF No. 12 at 3–4. Second, Plaintiff contends that “[u]nder basic principles of equity, the actions of the Post Office would comprise waiver, or compel estoppel to assert limitations under these circumstances.” *Id.* at 4–5.

“A statute-of-limitations defense, if apparent from the face of the complaint, may properly be raised in a motion to dismiss.” *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (internal quotation marks omitted). Dismissal of a complaint on a statute-of-limitations defense is proper if “it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim” and all factual questions are clearly resolved in the pleadings themselves. *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

However, Defendant has submitted a declaration and attached documents in support of the motion to dismiss and relies upon this information in arguing for dismissal. “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be

1 treated as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d).  
2 Plaintiff acknowledges that, in entertaining evidence outside of the pleadings, this  
3 matter should be treated as a motion for summary judgment and asserts she has  
4 “complied with the requirements of Rule 56 if the Court elects to treat this as a  
5 Summary Judgment motion.” ECF No. 12 at 3. Plaintiff has submitted her own  
6 declaration and documentation in support of her opposition to the motion. ECF  
7 No. 13; *see also* Fed. R. Civ. P. 12(d) (“All parties must be given reasonable  
8 opportunity to present all the material that is pertinent to the motion.”). As such,  
9 the Court will treat Defendant’s motion as one for summary judgment.

10 Summary judgment may be granted to a moving party who demonstrates  
11 “that there is no genuine dispute as to any material fact and that the movant is  
12 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party  
13 bears the initial burden of demonstrating the absence of any genuine issues of  
14 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then  
15 shifts to the non-moving party to identify specific genuine issues of material fact  
16 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
17 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the  
18 plaintiff’s position will be insufficient; there must be evidence on which the jury  
19 could reasonably find for the plaintiff.” *Id.* at 252. In ruling upon a summary  
20 judgment motion, a court must construe the facts, as well as all rational inferences

1 therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*,  
2 550 U.S. 372, 378 (2007). Only evidence which would be admissible at trial may  
3 be considered. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

4 The FTCA contains a statute of limitations under which a tort claim must be  
5 “presented in writing to the appropriate Federal agency within two years after such  
6 claim accrues.” 28 U.S.C. § 2401(b). For purposes of this provision,

7 a claim is deemed to have been presented when a Federal agency  
8 receives from a claimant, his duly authorized agent or legal  
9 representative, an executed Standard Form 95 or other written  
10 notification of an incident, accompanied by a claim for money  
11 damages in a sum certain for injury to or loss of property, personal  
12 injury, or death alleged to have occurred by reason of the incident[.]

13 28 C.F.R. § 14.2(a). A claim must include “(1) a written statement sufficiently  
14 describing the injury to enable the agency to begin its own investigation, and (2) a  
15 sum certain damages claim.” *Warren v. U.S. Dep’t of Interior Bureau of Land*  
16 *Mgmt.*, 724 F.2d 776, 780 (9th Cir. 1984) (en banc). A claim is not validly  
17 presented if it does not contain a demand for payment of a certain sum. *Avril v.*  
18 *United States*, 461 F.2d 1090, 1091 (9th Cir. 1972) (“It is plain that the required  
19 ‘claim’ is something more than mere notice of an accident and an injury. The term  
20 ‘claim’ contemplates, in general usage, a demand for payment or relief, and, unless  
it is a claim *for* something, is no claim at all.” (emphasis in original)).

1 The SF 95 form “contains a conspicuous space” for providing the amount of  
 2 a claim. *Id.* at 1091. Box 12 of the SF 95 form contains four sub-boxes for listing  
 3 amounts for property damage (12a), personal injury (12b), wrongful death (12c),  
 4 and total amount of the claim (12d). *E.g.*, ECF No. 1-1 at 1. Box 12d contains the  
 5 written warning, “Failure to specify may cause forfeiture of your rights.” *Id.* Box  
 6 12 also directs claimants to “[s]ee instructions on reverse.” *Id.* The reverse side of  
 7 the form contains the following warning:

8 A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED  
 9 WHEN A FEDERAL AGENCY RECEIVES FROM A  
 10 CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL  
 11 REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR  
 12 OTHER WRITTEN NOTIFICATION OF AN INCIDENT,  
 13 ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A  
**SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY,  
 14 PERSONAL INJURY, OR DEATH ALLEGED TO HAVE  
 15 OCCURRED BY REASON OF THE INCIDENT. THE CLAIM  
 16 MUST BE PRESENTED TO THE APPROPRIATE FEDERAL  
 17 AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM  
 18 ACCRUES.

19 *E.g.*, ECF No. 11-1 Ex. D at 3 (emphasis in original). Below this, the form  
 20 reiterates, in the only two portions printed in bold type, that

**Failure to completely execute this form or to supply the requested  
 material within two years from the date the claim accrued may  
 render your claim invalid. A claim is deemed presented when it is  
 received by the appropriate agency, not when it is mailed.**

....

**(d) Failure to specify a sum certain will render your claim invalid  
 and may result in forfeiture of your rights.**

1 *Id.* (emphasis in original).

2 Plaintiff does not dispute any of the above facts, including that Plaintiff's  
3 March 11, 2011, SF 95 form did not include demand for payment of a certain sum.  
4 *See* ECF No. 14 at ¶ 3. Nevertheless, Plaintiff contends that the March 11, 2011,  
5 SF 95 form represents a validly presented claim. Plaintiff argues that the FTCA  
6 "does not actually require a demand for a sum certain, rather it precludes damages  
7 in excess of the amount claimed, which where there was no sum certain set out,  
8 would be zero." ECF No. 12 at 3–4. Plaintiff contends further that her claim for  
9 an unspecified amount was accepted by Arstad in March 2011 and that she merely  
10 amended it in August 2013 based on "newly discovered evidence or intervening  
11 facts." *Id.* at 4 (citing 28 U.S.C. § 2675). The Court rejects this argument in the  
12 face of the clear and unambiguous requirement that an FTCA claim is not validly  
13 presented unless it includes a demand for a sum certain. *See* 28 C.F.R. § 14.2(a);  
14 *Warren*, 724 F.2d at 780. While a claimant may later amend a validly presented  
15 claim under 28 U.S.C. § 2675, a claim is not validly presented in the first place  
16 unless it contains a demand for a sum certain.

17 It is undisputed that the March 11, 2011, SF 95 claim did not include a  
18 demand for an amount certain. Therefore, the SF 95 form was not a validly  
19  
20



1 presented claim.<sup>2</sup> Plaintiff was required to present a valid claim by January 3,  
2 2013, two years after her injury. Plaintiff did not present a valid claim until  
3 August 16, 2013. Thus, absent equitable adjustment of the statute of limitations,  
4 her claim is “forever barred” under § 2401(b).

5 Plaintiff argues that, even though her claim was not filed until after the two  
6 year statute of limitations, the “basic principles of equity” compel the Court to  
7 conclude that the statute of limitations should be tolled or that Defendant should be  
8 estopped from asserting the statute of limitations. ECF No. 4, 8–9. Defendant  
9 contends that, even if equitable tolling is applicable to the FTCA’s statute of  
10 limitations, Plaintiff has not shown that she acted diligently or that extraordinary  
11 circumstances prevented her from filing earlier. ECF No. 16 at 5–8.

12 The Ninth Circuit has recently held that the two year statute of limitations is  
13 not jurisdictional, but merely a “claims-processing” provision, and as such

---

14 <sup>2</sup> Plaintiff asserts that her counsel believed from the language of Arstad’s March  
15 14, 2011, letter that her claim was filed and “merely needed to be amended to set  
16 out completed treatment and a sum certain demand.” ECF Nos. 12 at 4; 14 at ¶ 5.  
17 Any such inference was unreasonable given the express language of the SF 95  
18 form and of the March 14 letter itself which states unequivocally, “The claim is  
19 incomplete as a sum certain (exact dollar amount) has not been specified” and,  
20 “*This claim is therefore invalid.*” ECF No. 13-2 (emphasis added).

1 “equitable adjustment of the limitations period in § 2401(b) is not prohibited.”  
2 *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1038, 1051 (9th Cir. 2013), *cert.*  
3 *granted*, 134 S. Ct. 2873 (2014).<sup>3</sup> Plaintiff has asserted the application of two  
4 different equitable adjustments to her claim: equitable tolling of the statute of  
5 limitations and equitable estoppel that prevents the government from asserting the  
6 statute of limitations. The Court addresses each in turn.

7 In appropriate circumstances, the equitable tolling doctrine may be used to  
8 adjust the § 2401(b) time limit. *Kwai Fun Wong*, 732 F.3d at 1038. This doctrine

9  
10 <sup>3</sup> The Supreme Court has recently heard arguments in an appeal of the Ninth  
11 Circuit’s opinion in *Kwai Fun Wong*. The Supreme Court’s resolution of the case  
12 will have no bearing on the outcome of the matter at hand. If the Supreme Court  
13 affirms the claims-processing nature of § 2401(b), Plaintiff’s claims is nevertheless  
14 barred because, as the Court discusses below, she has not established that equitable  
15 adjustment of the time period is appropriate in this case. If the Supreme Court  
16 concludes § 2401(b) is jurisdictional then Plaintiff’s claim is barred solely on the  
17 ground that she did not present a valid claim within two years of her injury. Given  
18 this result, the Court need not consider Defendants’ argument that “[p]roviding a  
19 ‘sum certain’ is a separate jurisdictional requirement under 28 U.S.C. § 2675(a),  
20 distinct from the statute of limitations in § 2401(b).” ECF 16 at 8–9.

1 “enables courts to meet new situations [that] demand equitable intervention, and to  
2 accord all the relief necessary to correct . . . particular injustices.” *Id.* (quoting  
3 *Holland v. Florida*, 560 U.S. 631, 650 (2010)). “Generally, a litigant seeking  
4 equitable tolling bears the burden of establishing two elements: (1) that he has  
5 been pursuing his rights diligently, and (2) that some extraordinary circumstances  
6 stood in his way.” *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414,  
7 1419 (2012) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)) (emphasis  
8 omitted).

9       The first element requires the litigant to show she undertook “the effort that  
10 a reasonable person might be expected to deliver under his or her particular  
11 circumstances.” *Kwai Fun Wong*, 732 F.3d at 1052 (quoting *Doe v. Busby*, 661  
12 F.3d 1001, 1015 (9th Cir. 2011)). “Central to the analysis is whether the plaintiff  
13 was ‘without any fault’ in pursuing his claim.” *Id.* (quoting *Fed. Election Comm’n*  
14 *v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996)).

15       The second element requires the litigant to show “that ‘extraordinary  
16 circumstances were the cause of his untimeliness and . . . ma[de] it impossible to  
17 file [the document] on time.’” *Id.* (quoting *Ramirez v. Yates*, 571 F.3d 993, 997  
18 (9th Cir. 2009)) (alterations in original). “Accordingly, ‘[e]quitable tolling is  
19 typically granted when litigants are unable to file timely [documents] as a result of  
20

1 external circumstances beyond their control.” *Id.* (quoting *Harris v. Carter*, 515  
2 F.3d 1051, 1055 (9th Cir. 2008)).

3 Plaintiff argues that equitable tolling should adjust the time restraints in this  
4 case. She argues:

5 Plaintiff’s counsel exercised all diligence in filing the initial tort claim  
6 in a timely manner, except for not inserting a sum certain claim. That  
7 was because the sum certain could not then be determined as  
8 treatment was ongoing. The critical issue of course is that the Post  
Office actually directed Plaintiff to wait to file her claim until  
treatment was completed, which didn’t occur until the time of the 2nd  
claim filing.

9 ECF No. 12 at 9. The Court disagrees.

10 The March 14, 2011, letter from Arstad does indeed state: “If your client is  
11 still treating for injury please wait until treatment has concluded to file this claim.  
12 At that time, please complete a new form SF 95 . . . and return to this office for  
13 processing.” ECF No. 13-2. However, the circumstances surrounding this  
14 statement do not establish that Plaintiff’s counsel had an “excusable ignorance of  
15 the limitations period.” *See Lehman v. United States*, 154 F.3d 1010, 1016 (9th  
16 Cir. 1998).

17 Arstad “had no duty to inform the plaintiff of the statute of limitations.” *Id.*  
18 Nevertheless, Arstad informed Plaintiff’s counsel of the two-year statute of  
19 limitations in the February 7, 2011 letter. ECF No. 11-1 Ex. B. Arstad also  
20 directed Plaintiff’s counsel to the SF 95 instructions in both the February 7 and

1 March 14 letters. ECF No. 11-1 Exs. B, E.; 13-2. Those instructions clearly state,  
2 “THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL  
3 AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES,” and  
4 “**Failure to completely execute this form or to supply the requested material**  
5 **within two years from the date the claim accrued may render your claim**  
6 **invalid.**” ECF No. 11-1 Ex. D (emphasis in original).

7 Arstad’s comment that Plaintiff should wait for treatment to be finished must  
8 be read in the full context of the February and March letters and the clear  
9 instructions on SF 95. As such, Arstad’s statement merely informed Plaintiff’s  
10 counsel to file a claim when Plaintiff had a more certain notion of the amount of  
11 damages sought; the statement did not obviate the clearly applicable statute of  
12 limitations. There is nothing in Arstad’s letter indicating that the Postal Service  
13 would toll the statute of limitations or forego a statute-of-limitations defense. *See*  
14 *Lehman*, 154 F.3d at 1016. It was counsel’s duty to protect Plaintiff’s interests, not  
15 Astrad’s duty. Plaintiff simply failed to exercise due diligence in preserving her  
16 rights by timely presenting a valid claim in accordance with § 2041(b) even though  
17 this requirement was evident in a number of ways.

18 Moreover, there are no extraordinary circumstances in this case which would  
19 have prevented Plaintiff from filing a timely claim. Plaintiff could have presented  
20 a valid claim, demanding a sum certain, anytime within the two-year window

1 based upon treatment up to that point and projecting the damages forward.<sup>4</sup> No  
2 unusual circumstances prevented Plaintiff from doing so. *See Lehman*, 154 F.3d at  
3 1016 (“[T]he affidavit does *not* state that the government prevented plaintiffs from  
4 re-filing the action, for example, by creating impossible timing.”). Plaintiff’s lapse  
5 in filing a timely claim may have resulted from failing to appreciate the applicable  
6 statute of limitations, but such negligence is not the type of injustice which  
7 warrants invoking the equitable tolling doctrine. *See Holland*, 560 U.S. at 651–52  
8 (“[A] garden variety claim of excusable neglect . . . such as a simple miscalculation  
9 that leads a lawyer to miss a filing deadline . . . does not warrant equitable tolling.”  
10 (internal quotation marks and citation omitted)).

11 Plaintiff also invokes the equitable estoppel doctrine and argues that  
12 Defendant should be estopped from asserting the statute of limitations because  
13 “Plaintiff believed it could rely on the Post Office’s direction to wait, and did so.”  
14 ECF No. 12 at 9. The Ninth Circuit has held that in certain cases, where “justice  
15 and fair play require,” the doctrine of equitable estoppel may be applied against the  
16 government. *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989). However,  
17 it is well-settled law “that the government may not be estopped on the same terms  
18

---

19 <sup>4</sup> Amendment of this claim would have been appropriate at a later point based upon  
20 any changes in Plaintiff’s treatment. *See* 28 U.S.C. § 2675.

1 as a private litigant.” *Id.* (citing *Heckler v. Cmty. Health Svcs. of Crawford Cnty.,*  
2 *Inc.*, 467 U.S. 51, 60 (1984)). A party asserting equitable estoppel against the  
3 government must establish that “(1) the government engaged in affirmative  
4 misconduct going beyond mere negligence; (2) the government’s wrongful acts  
5 will cause a serious injustice; and (3) the public’s interest will not suffer undue  
6 damage by imposition of estoppel.” *Baccei v. United States*, 632 F.3d 1140, 1147  
7 (9th Cir. 2011). The burden of proof lies with the party seeking to raise estoppel.  
8 *Id.* Only after this threshold showing is met, will courts consider the traditional  
9 elements of estoppel. *See Watkins*, 875 F.2d at 709; *see also United States v.*  
10 *Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995).

11 Plaintiffs have made no showing of the elements required to assert estoppel  
12 against a federal governmental entity. Based upon the undisputed facts, the Court  
13 concludes that Arstad did not engage in affirmative misconduct going beyond mere  
14 negligence in stating that Plaintiff could wait until treatment was complete before  
15 filing as this is not an affirmative misrepresentation or concealment of a material  
16 fact. *See Baccei*, 632 F.3d at 1147 (“Affirmative misconduct on the part of the  
17 government requires an affirmative misrepresentation or affirmative concealment  
18 of a material fact . . . such as a deliberate lie or a pattern of false promises.”  
19 (citations omitted)). The Court also concludes that Arstad’s statement did not  
20 cause Plaintiff a profound or unconscionable injury amounting to a serious

1 injustice. Though the statement may be considered ambiguous, it did not compel  
2 Plaintiff to forgo filing within the two-year timeframe. *See Schuster v. C.I.R.*, 312  
3 F.2d 311, 317 (9th Cir. 1962) (“[A] person might sustain such a profound and  
4 unconscionable injury in reliance on the Commissioner's action as to require, in  
5 accordance with any sense of justice and fair play, that the Commissioner not be  
6 allowed to inflict the injury.”).

7       There is no genuine dispute as to any material fact in this case. The  
8 undisputed facts establish that Plaintiff did not present a valid claim until after the  
9 two-year statute of limitations had run. The undisputed facts also establish that  
10 Plaintiff is not entitled to any equitable adjustment of the statute of limitations.  
11 Therefore, Defendant is entitled to judgment as a matter of law.<sup>5</sup>

12 //

13 //

14 //

15 //

16 //

---

17  
18 <sup>5</sup> Because the Court grants summary judgment in Defendant’s favor, it need not  
19 address Defendant’s contention that the wrong entity was named as the defendant  
20 in this case.



1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 Defendant's Motion to Dismiss (ECF No. 11) is **GRANTED**.

3 The District Court Executive is hereby directed to enter this Order, enter  
4 **JUDGMENT** for Defendant on all claims, provide copies to counsel, and **CLOSE**  
5 the file.

6 **DATED** March 31, 2015.



9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge